IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. _____

STATE OF OHIO, ex rel. DAVID KING,

Appellant,

v.

RAYMOND E. SHANNON, Presiding Judge, Municipal Court of Cincinnati, Ohio,

Appellee.

Appeal from the Supreme Court of Ohio

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

Appellant, David King, submits the following statement in support of his contention that the federal constitutional questions presented herein are substantial and there is sufficient basis to invoke the jurisdiction of this Court to review on appeal the judgment and order of the Supreme Court of Ohio in Case No. 36219 before it, refusing to review the constitutionality of Cincinnati Municipal Ordinance No. 901-i3, and to allow ancillary action to prevent an unconstitutional exercise of power by the Municipal Court of Cincinnati, Ohio.

OPINIONS BELOW

The opinion of the Supreme Court of Ohio is officially reported in 170 Ohio State 393. A copy of this opinion is

reprinted herein as Appendix "A." The original trial court in the action of prohibition, the Court of Appeals for Hamilton County, Ohio, rendered no written opinion, although it did promulgate "Findings of Fact Found Separately from Conclusions of Law." Since the Supreme Court of Ohio has fully synopsized the findings of fact and has quoted in full the conclusions of law contained therein in the body of its opinion, reprinted herein as Appendix "A," the same is not reprinted herein. The Judgment Entry of the Supreme Court of Ohio and the entry of that Court denying Appellant's application for rehearing are attached hereto as Appendix "B."

JURISDICTION

These proceedings were originally initiated by the filing of an action in prohibition in the Court of Appeals for Hamilton County, Ohio, wherein the relator Appellant, David King, sought a writ of prohibition against Raymond E. Shannon, Presiding Judge of the Cincinnati Municipal Court, respondent-appellee, to prevent the carrying into execution a sentence imposed on relator after he was charged, tried and found guilty in the Municipal Court of a violation of Section 901-i3 of the Code of Ordinances of the City of Cincinnati, Ohio.

The ordinance under which the appellant was originally convicted, Cincinnati Municipal Ordinance Number 901-i3, reads in its entirety as follows:

> "Whoever shall print, engrave, sell, offer for sale, give away, exhibit or publish, or exhibit as for sale or other purpose or have in his possession or under his control, any obscene, lewd, lascivious, indecent, or immodest book, pamphlet, paper, image cast, statuary, drawing or representation, or any other article of an indecent or immoral nature, or book, paper, print, circular or writing made up principally of pictures or

stories of immodest deeds, lust or crime, or shall exhibit upon the public street or highway, any of the articles or papers, prints, publications, as aforesaid, within the view of passerby upon said street or highway, shall be fined not more than one hundred ($100.00) dollars, or imprisoned not more than (60) days, or both."

The original criminal action was tried to the Court, Judge Ralph Kohnen, a jury having been waived. During the course of said trial, then counsel for the defendant, made no objection to the jurisdiction of the Municipal Court or the constitutionality of the ordinance being enforced because of either the conflict of the Municipal Ordinance with Ohio Revised Code Section 2905.34 or the complete absence of the element of scienter from the ordinance. Following conviction on an affidavit and a record both silent on the element of knowledge, the Court imposed sentence of sixty days in jail and a fine of one hundred dollars and costs. A stay of execution was granted, pending an appeal. During the course of appeal, Judge Kohnen resigned from the Municipal Court of Cincinnati, and his unexecuted duties were assumed by the respondent as Presiding Judge of said Municipal Court.

The Defendant appealed to the Court of Common Pleas of Hamilton County, Ohio and upon affirmance therein, to the Court of Appeals of Hamilton County, Ohio. In neither court was the appeal in any manner predicated upon nor did it either directly or inferentially refer to the issues of jurisdiction or the unconstitutionality of the removal of the element of scienter from an ordinance dealing with books, or the possible conflict of the municipal misdemeanor ordinance with the State felony statute. The Court of Appeals affirmed the Court of Common Pleas. Further appeal was carried to the Supreme Court of Ohio. The notice of appeal still raised none of the foregoing critical issues.

The Supreme Court of Ohio denied appeal of right *specifically because constitutional issues had not been raised at any point.* It issued a mandate to carry its judgment into effect. (*City of Cincinnati* v. *King,* 169 O. S. 107, 157 N. E. 2d 431.)

Pending receipt of this mandate, present counsel was retained. The relator, through new counsel, orally requested a further stay of execution of the Municipal Court, pending submission and consideration of the constitutional issues, going to the very jurisdiction of the court. This was refused and the present action in prohibition was instituted in the Court of Appeals of Hamilton County, Ohio. Said Court denied the Writ of Prohibition after the adduction of the foregoing evidence. Motion for a new trial was denied, and appeal carried to the Supreme Court of Ohio. Judgment Entry affirming the ruling of the Court of Appeals was entered on March 16, 1960 (Appendix "B"). The appellant filed application for rehearing, which was denied by Entry of the Court on April 13, 1960 (Appendix "B"). Notice of Appeal to the United States Supreme Court was filed in the Supreme Court of Ohio on June 9, 1960 (See Appendix "D"). On August 1, 1960, the Supreme Court of Ohio granted thirty additional days in which to perfect appeal, under authority of Rule 13, Subparagraph 1 of the rules of this Court.

The jurisdiction of the Supreme Court to review these judgments by appeal is conferred by Title 28, United States Code, Section 1257(2). The case however, presents several federal questions. Basically, the proceeding is grounded in a federal constitutional attack on a municipal ordinance and is reviewable by appeal. The element, however, of the refusal of the Supreme Court of Ohio to entertain such question of constitutionality in a proper ancillary proceeding, also indicates certiorari as remedy, the defendant being deprived of rights without due process of law in violation

of the 14th amendment to the Constitution of the United States. The Court is respectfully sought to consider this element as well as the direct issue in the nature of appeal under authority of 28 U. S. C. 2103, *Flournoy* v. *Wiener*, 321 U. S. 253, *Prudential Ins. Co.* v. *Cheek*, 259 U. S. 530 and *Cantwell* v. *Connecticut*, 309 U. S. 626, 310 U. S. 296.

The following decisions sustain the jurisdiction of the Supreme Court to review the judgment in this case: *Smith* v. *California*, 28 U. S. Law Week 4033; *Powell* v. *Alabama*, 287 U. S. 45; *Brown et al.* v. *State of Mississippi*, 297 U. S. 278, 56 S. Ct. 461; *Honeyman* v. *Hanan*, 302 U. S. 375, 58 S. Ct. 273; *Yick Wo* v. *Hopkins*, 118 U. S. 356; *Hill* v. *Sanford*, 131 F. 2d 417; *Dreyer* v. *Pease*, 20 S. Ct. 1025, 176 U. S. 681.

QUESTIONS PRESENTED

The following questions are presented by this appeal:

1. Is Section 901-i3 of the Code of Ordinances of the City of Cincinnati unconstitutional as an unreasonable constraint upon freedom of press in that it imposes criminal liability for mere unknowing possession of obscene literature, in violation of the 1st Amendment to the Constitution of the United States?

2. If Section 901-i3 is so unconstitutional, is any conviction for violation thereof a nullity, and imposition of sentence thereon subject to prohibition?

3. Is the position of the Supreme Court of Ohio, to the effect that if a constitutional question is not raised in the original trial of a criminal action, the accused is forever barred from asserting the same, even in a proper ancillary proceeding to test the constitutionality of the enforced ordinance and the basic jurisdiction of the Court to act under the force thereof, a violation of due process of law and of the accused of his rights under the 14th Amendment of the United States Constitution?

STATEMENT OF THE CASE

The facts of the case have been stated under the caption of *Jurisdiction* foregoing. Emphasis is again made of the silence of the record of the original criminal trial on the element of knowledge, and of course the complete absence of said element in the ordinance under which the original conviction was obtained. These issues were never raised in the original trial and appeal. Thereafter the original court refused to entertain consideration of the constitutional issues engendered by such circumstances and an *entirely new* action in prohibition was instituted. This is an appeal from that entirely new action, in which the constitutional issues were not only raised in the original instance but were indeed the very basis of the cause of action. The record thus speaks for itself on the preservation of the Federal issues in *this action*. Emphasis of this may be seen from reading the opinion of the Court (Appendix "A") and the motion for a rehearing filed in response thereto (Appendix "E").

THE FEDERAL QUESTIONS ARE SUBSTANTIAL

The questions presented by this appeal are so substantial as to require plenary consideration by this Court with briefs on the merits and oral arguments for their resolution. Each question presented involves constitutional principles which affect the basic rights of the appellant herein and all citizens of the United States.

The Cincinnati Ordinance in question goes far beyond the California law struck down in *Smith* v. *California* (23 U. S. Law Week 4033). It takes the element of knowledge out of possession of obscene literature under any and all circumstances whatsoever. Thus not only is the dealer hamstrung; anyone who handles a book does so at his peril. Not only is commerce in books encumbered, but any picking up to peruse by anyone, any exploration into

contents by anyone becomes an act of courting a misdemeanor, the crime committed by the very act of study, perhaps the very exercise of conscience. It is patently unconstitutional.

But a critical issue for constitutional determination remains in addition in this case. The defendant did not assert that patent unconstitutionality in his original trial. When his then counsel began to become conscious of the constitutional issues involved and to hint of their existence, the Supreme Court of Ohio refused to entertain him in discussion of the same but ruled on his appeal as of right that it was to be dismissed "for the reason that no constitutional question was raised in the lower courts." (*City of Cincinnati* v. *King*, 169 Ohio St. 107, 157 N. E. 2d 431.) The original trial tribunal was then asked to consider the constitutional issues and declined. The action in prohibition followed. Then here in a direct attack on the power of the court to act under an unconstitutional ordinance, on a matter which could not be a crime because of constitutional protection, the Supreme Court hearkened back to the original failure to plead the same in the criminal action and in effect promulgated a doctrine that laches of a defendant can breathe vitality in an ultra-vires exercise of power by a court.

The weight of authority supports a rule that a court may, on a proper ancillary proceeding, inquire into the constitutionality of a statute or ordinance under which the petitioner has been convicted and if the statute proves to be unconstitutional, the petitioner must be discharged (Annotations 32 A. L. R. 1054). On the other hand, Ohio has consistently clung to a minority view that a judgment of conviction in a criminal court having jurisdiction of the offense, is not void, because of the invalidity of the ordinance or statute under which the conviction may have been had and that ancillary relief is not available (*Yutze*

v. *Copelan*, 109 O. S. 171, 32 A. L. R. 1048, 142 N. E. 33). The courts adhereing to the first rule base is upon the conclusion that if a statute or ordinance is unconstitutional the trial court is entirely without jurisdiction. If this view obtains, Ohio is clearly abusing due process by having the silence of a defendant vest jurisdiction where no constitutional basis of exercise of power exists. Thus the issue of whether the minority view denying the right to seek by writ of habeas corpus or other ancillary petition a determination of whether the accused was convicted under a de jure statute, unless such issue was made in the original trial, is, in and of itself, a denial of due process of law clearly presents itself in the present cause.

But an even stronger issue of due process presents itself. Even in clinging to the minority view, as though the silence of the accused could vest plenary powers, Ohio admits the original trial tribunal must have had "jurisdiction of the offense." (*Yutze* v. *Coplan*, 109 O. S. 171, 32 A. L. R. 1048, 142 N. E. 33.) What then here, were there could be no "offense" by constitutional privilege granted in the 1st amendment made binding upon the states by the 14th amendment? Unknowing possession cannot be an offense against law by effect of constitutional privilege. Thus the original trial tribunal was acting without a color of right, and Ohio puts the burden of assertion of this on the accused in the original and single instance of a first trial, or else his laches has invested a power in the Court, not derived to it by force of law. It seems imperative that the Supreme Court of the United States rule on whether this constitutes due process of law under a constitutional system.

CONCLUSION

The refusal of the Supreme Court of Ohio to undertake consideration of constitutionality in a proper ancillary

attack upon an ordinance in which even unknowing possession of obscene books by anyone under any circumstances is made subject to criminal conviction raises serious questions of whether Ohio courts are in such instance acting within the constraints imposed upon them by the 14th amendment to the Constitution of the United States.

Respectfully submitted,

ALLEN BROWN,

Attorney for Appellant.